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IN THE
SUPREME COURT OF THE UNITED STATES

JENNIFER GRATZ AND PATRICK HAMACHER, *Petitioners*
v.
LEE BOLLINGER, ET AL., *Respondents*

On Writ of Certiorari to the
United States Court of Appeal for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, COALITION OF BAR ASSOCIATIONS OF COLOR, AND SIGMA PI PHI FRATERNITY IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its members include former Attorneys General, former Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. Over the last forty years, the Lawyers' Committee and its independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. have represented members of minority groups and women in hundreds of civil rights cases. Among the essential interests of the Lawyers' Committee is the proper construction and implementation of programs to remedy racial discrimination and its effects and to ensure that all members of our society share in its institutions, opportunities, and benefits.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups and the elimination of racial prejudice.

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[1] Pursuant to Rule 37.6, the *Amici* state that no counsel for any party in this case authored any portion of this brief, and no person other than the *Amici* and their counsel have made any monetary contribution to its preparation or submission. Concurrent with this brief, letters of consent to its filing have been lodged with the Clerk of the Court under Rule 37.3.

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote legally defensible minority business opportunity programs that ensure the fair and equitable participation of minority businesses in the marketplace. As part of its mission, MBELDEF encourages affirmative action initiatives designed to assist minority entrepreneurs in the marketplace.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated since 1972 to the advancement and protection of women's legal rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. It has a deep and abiding interest in assuring the continued vitality of affirmation action programs and policies that open the doors of opportunity for minorities and women.

The National Partnership for Women & Families, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and race discrimination in education and employment, and advancing women's opportunities in education, employment, and other aspects of American life.

The Coalition of Bar Associations of Color ("CBAC") consists of the National Bar Association, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, and the Native American

Bar Association. CBAC advances the common interests of these bar associations through joint resolutions, actions, and meetings. Through these actions, CBAC reflects the unity of these bar associations in responding to issues concerning lawyers of color.

Sigma Pi Phi Fraternity is a non-profit organization of college- and university-educated professional men dedicated to the uplift of the African American community through local and national social action programs, concentrated heavily in the area of education, and focusing on mentoring and providing scholarships for economically disadvantaged minority youth. Founded in 1904, Sigma Pi Phi is the oldest predominantly African American Greek-letter fraternity, with 110 member boulés (local chapters) nationwide. Its mission is to gather together men of good training, intelligence and culture for the good of themselves and the community and "by concerted action bring about those things that seem best for all that cannot be accomplished by individual efforts." Sigma Pi Phi has adopted a policy position in support of preserving affirmation action in order to assure equal opportunity in American society.

SUMMARY OF ARGUMENT

The question presented in the Petition asks whether the University of Michigan's undergraduate admissions program is unlawful under 42 U.S.C. § 1981. This statute codifies a provision of the 1866 Civil Rights Act enacted pursuant to the Thirteenth Amendment. Section 1981 does not foreclose the University's remedial consideration of race but indeed supports it.

Amici submit that the inclusion of race, as one factor among a number of factors, in determining admissions from among qualified applicants to the University's undergraduate

programs is constitutionally justified by two distinct compelling interests. The first is the remedial interest of eliminating the "badges and incidents of slavery," particularly with respect to educational opportunity. The second compelling interest is in achieving diversity in institutions of higher education. The first of these interests is firmly grounded in the Thirteenth Amendment and the articulation of its purpose and intent in contemporary provisions of the 1866 Civil Rights Act. The second interest is informed by this Amendment and statute. In addition, the Thirteenth Amendment and the contemporaneous legislation implementing its commands not only complement, but modify, precedent developed under the Fourteenth Amendment. The Thirteenth Amendment provides a related, but different, remedial justification for the permissible consideration of race. It reinforces the historical moorings and purposes of the Fourteenth Amendment, requiring greater elasticity in its appropriate application.[2]

Slavery and subsequent, state-imposed segregation were part of a system depriving African Americans of educational opportunities. The University should be allowed to address voluntarily the continuing effects of that deprivation, through remedial measures and a pursuit of diversity informed by history.

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[2] Although the University has not advanced a remedial justification for its program, instead confining itself to the interest in diversity articulated by Justice Powell in *Bakke*, the Intervenors have asserted a remedial basis. And the evidence demonstrating racial disparities in the application of the University's criteria for admissions, and in the education offered to young African Americans and other racial minorities in Michigan and the nation, supports the remedial interest addressed in this brief.

ARGUMENT

THE THIRTEENTH AMENDMENT AND THE 1866 CIVIL RIGHTS ACT PROVIDE A COMPELLING REMEDIAL INTEREST AND INFORM A DIVERSITY INTEREST.[3]

A. This Court's Compelling Remedial Interest Has Largely Been Shaped By Consideration of The Fourteenth Amendment.

This Court's decision in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), contained two distinct perspectives on the constitutionally permissible use of race in university admissions.[4] On the one hand, Justice Powell found "the attainment of a diverse student body" to be "clearly [ ] a constitutionally permissible goal for an institution of higher education," *id.* at 311-12, and, that "[i]n enjoining petitioner from ever considering the race of any applicant ... the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320. On the other hand, Justices, Brennan, White, Marshall, and Blackmun joined Justice Powell in approving

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[3] The Thirteenth Amendment provides, in pertinent part: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction. U.S. Const. amend. XIII, § 1.

[4] Only five Justices participated in the discussion of the Fourteenth Amendment, because four Justices confined their views solely to the interpretation of Title VI of the Civil Rights Act of 1964. *Id.* at 408 (Stevens, J., concurring in the judgment in part and dissenting in part).

the competitive consideration of race to achieve diversity, "at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination." *Id.* at 326 n.1.

All of these Justices agreed that it was constitutionally permissible to consider race to remedy discrimination. They differed with respect to whether the plan at issue satisfied scrutiny under the Fourteenth Amendment on the basis of its remedial purpose. Justice Powell distinguished the permissible use of race, where judicial, legislative or administrative findings of discrimination have been made, from impermissible use for the purpose of "remedying [ ]the effects of 'societal discrimination.'" *Id.* at 307. He viewed societal discrimination as "an amorphous concept of injury that may be ageless in its reach into the past." *Id.* The remaining Justices concluded that

> [The] articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the [s]chool.

Id. at 362.

The difference in views, between the justices reaching the constitutional issue, is largely traceable to differing constructions of the Equal Protection Clause of the Fourteenth Amendment. Justice Powell recognized that "[t]he Court's initial view of the Fourteenth Amendment was that its 'one pervading purpose' was 'the freedom of the slave race, the security and firm establishment of that

freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him.'" *Id.* at 291. He also recognized that "[t]he Equal Protection Clause . . . was '[virtually] strangled in infancy by post-civil-war judicial reactionism,'" and "relegated to decades of relative desuetude," during which its "'one pervading purpose' was displaced," referring to *Plessy v. Ferguson, 163 U.S. 537 (1896).* *Id.* (citations and footnotes omitted). However, when "the Equal Protection Clause [again] began to attain a genuine measure of vitality," Justice Powell opined that "it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority." *Id.* at 292. Thus, Justice Powell concluded that "[t]he guarantees of equal protection 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'" *Id.* at 292-93 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). Justice Powell's views did not include consideration of legislative authority under either the Thirteenth or Fourteenth Amendments. *Id.* at 302 n.41.

In his powerful but angry, concurring opinion in *Bakke*, Justice Marshall disagreed with broader or "universal" construction of the Equal Protection Clause, to the extent that the construction might be interpreted to prohibit considering race to remedy the effects of discrimination. Justice Marshall's opinion began by looking back at slavery.

> Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful

> to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing him or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.

Id. at 387-88 (Marshall, J.) The opinion then traced the continuing legally established and enforced deprivations of African Americans, and the Court's complicity in that enterprise through interpretations of the Fourteenth Amendment, *see id.* at 390-94. He concluded, "The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro." *Id.* at 395. After reviewing existing precedent, he concluded that there was "ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination." *Id.* at 400.

Similarly, the joint opinion authored by Justice Brennan traced the tragic history of Fourteenth Amendment interpretation, including the fact that it was "early turned against those whom it was intended to set free." *Id.* at 326-27.

In Justice Powell's view, although the original purpose of the Equal Protection Clause had been strangled by "judicial reactionism" and that original purpose was then "displaced" by *Plessy*, when it was later resuscitated it could no longer serve as a basis for remedying the particular injuries to African Americans caused by centuries of subjugation. In contrast, the four concurring Justices felt that this construction failed to take into account the "moorings" of the Fourteenth Amendment as reflected in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny. *Id.* at 405. As Justice Blackmun put it:

> This enlargement [of the Fourteenth Amendment] does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.

Id. at 405 (Blackmun, J.).

In cases since *Bakke*, the Court repeatedly has held that the Fourteenth Amendment permits the consideration of race under strict scrutiny. Use of race must be supported by a compelling interest and narrowly tailored[5] to achieve that interest. *City of Richmond v. Croson*, 488 U.S. 469, 491-92 (1989); *id.* at 518 (Kennedy, J., concurring). *See also Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995). The Court has emphasized that strict scrutiny is not a veiled prohibition, and has pointed to instances in which that scrutiny has been satisfied. *Adarand*, 515 U.S. at 237 (citing *United States v. Paradise*, 480 U.S. 149, 167 (1987)). Among the interests recognized as compelling is the objective, and at times, the obligation, to remedy discrimination. *See, e.g., Croson*, 488 U.S. at 518 (Kennedy,

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[5] Although *Amici* do not explore the narrow tailoring aspect of the University's admissions program in these pages, we adopt by reference all arguments advanced in the Brief of *Amici Curiae* Lawyers' Committee, et al., in *Grutter v. Bollinger*.

J., concurring) ("the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself."). *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."); *Adarand*, 515 U.S. at 237; *cf. Johnson v. Transp. Agency*, 480 U.S. 616, 634 (1987).

The Court also has held that local, state and federal authorities may remedy past and present, public and private discrimination without an established constitutional or statutory violation, when acting on a firm basis in evidence that a remedy is needed. *Croson*, 488 U.S. at 491-92, 499-501. *See also Wygant*, 476 U.S. at 277; *id.* at 292-93 (O'Connor, J., concurring). That firm basis is supplied by evidence of a manifest imbalance or an under-representation of members of a particular race, compared to an appropriately qualified population, participating in or benefiting from an activity. *Johnson*, 480 U.S. at 631-32 (citing, among other cases, *United Steelworkers v. Weber*, 443 U.S. 193 (1979)). *See also Croson*, 488 U.S. at 501-02. When these requisites are met and the use of race is narrowly tailored to achieve the remedial end, consideration of race is constitutionally permissible under the Fourteenth Amendment.[6]

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[6] In other circumstances, consideration of race as one factor in the decision-making has been held to be constitutionally permissible, in the absence of strict scrutiny, when other traditionally relevant factors are also considered and followed. Race, in certain circumstances, simply cannot be the predominant factor in decision-making. *See e.g., Bush v. Vera*, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). *See*

(Footnote continued)

Although general "societal discrimination" and other proffered justifications have been held not compelling, *see, e.g., id.* at 276 (rejecting a "role model" theory), the Court has never attempted exhaustively to define or catalogue all of the interests and purposes that might be found compelling. *Id.* at 286 (O'Connor, J., concurring) ("certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests... sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies.").

The precise contours of "strict scrutiny" review remain open, and the Court has emphasized that this scrutiny is strict but not necessarily fatal:

> Indeed, the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest. See *ante*, at 237 ("We wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' *Fullilove*, *supra*, at 519 (Marshall, J., concurring in judgment)"); see also *Missouri v. Jenkins*, *ante*, at 112 (O'Connor, J., concurring) ("But it is not true that strict scrutiny is 'strict in theory, but fatal in fact.'").

Adarand, 515 U.S. at 268 (Souter, J., dissenting).

The Court's post-*Bakke* exploration of the permissible extent of the constitutional consideration of race, *Amici* suggest, lacks a complete exposition of the historical

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also, Easley v. Cromartie, 532 U.S. 234, 242 (2001); *Miller v. Johnson*, 515 U.S. 900, 917 (1995); *cf. Johnson*, 480 U.S. at 638 (gender).

moorings of the Thirteenth and Fourteenth Amendments. A university's voluntary adoption of a plan that not only seeks to obtain critical diversity, but also serves to remedy the *present effects of racial discrimination fairly characterized as "badges and incidents of slavery"* is compelling. Any scrutiny of voluntary practices that serve to remedy the historical effects of invidious racial classifications that does not read the Equal Protection Clause in its historical context, denies the original intent of the first two Reconstruction Amendments. Such uninformed reading, then, would strip this nation of its constitutional history regarding race.

B. <u>The Fourteenth Amendment Must Be Read *In Pari Materia* With The Thirteenth Amendment and the Civil Rights Act of 1866.</u>

The Civil Rights Act of 1866 inextricably intertwines, the Thirteenth Amendment and the Fourteenth Amendment.[7] Going to first principles of statutory construction, the Thirteenth Amendment, and the Civil

[7] The Congressional record establishes that the Thirteenth Amendment provided the foundation for Section 1 of the Fourteenth Amendment, the section containing the Equal Protection Clause. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 48 n.227 (1990). Soon after the Civil Rights Act of 1866 (now 42 U.S.C. § 1981) was passed, its proponents felt the need to protect it with a new constitutional amendment. *Id.* at 47-48; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 771 (1985). Language for what became Section 1 of the Fourteenth Amendment was introduced only three weeks after Congress had overridden President Johnson's veto of that Act. Colbert, 76 *supra* at 48 n.227; *see also Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968) ("It is quite true that some members of Congress supported the Fourteenth Amendment 'in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States.'" (quoting *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948)).

Rights Act of 1866 must be read *in pari materia* with the Equal Protection Clause.[8] Reading them together guards against the concern that the Fourteenth Amendment might again be "broken away from its moorings and its original intended purposes." *Bakke*, 438 U.S. at 404-05 (Blackmun, J.). The Thirteenth Amendment and its implementing legislation remains vital and, tragically, necessary. Both the purposes and force of these measures distinguish discrimination and its effects traceable as badges and incidents of slavery from a "claim to a history of prior discrimination" asserted by "various minority groups" within "the white 'majority.'" *See id.* at 295 (Powell, J.); *Croson*, 488 U.S. at 505-06.

To the extent that the Thirteenth Amendment's purpose to eliminate the badges and incidents of slavery increases the tension between the Fourteenth Amendment's remedial purpose that can require consideration of race, and the so-called "broader" purpose of achieving equality without reference to race, Justice Blackmun identified this as "original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in this area." *Bakke*, 438 U.S. at 405 (Blackmun, J.). The increased weight of the commands of the Thirteenth Amendment to remedy the continuing effects of slavery suggests a principled constitutional basis for greater "elasticity" in the application of strict scrutiny review.[9]

[8] *See, e.g., Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972); *cf. Patton v. United States*, 281 U.S. 276, 298 (1930) ("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former.").

[9] In many respects, the tensions of which Justice Blackmun wrote are analogous and require treatment similar to tensions inherent in

(Footnote continued)

Reference to the Thirteenth Amendment and the Civil Rights Act of 1866 also clearly establishes a "principled distinction" between historically-linked incidents and consequences of race-based discrimination traceable to slavery that "merit 'heightened judicial solicitude'" from other claims of "prejudice and consequent harm," and the concept of general "societal discrimination." *See Bakke*, 438 U.S. at 296-97 (Powell, J.).

The Equal Protection Clause should inform, but not limit, analysis of the permissible consideration of race pursuant to the Thirteenth Amendment. Because the Fourteenth was promulgated, in large part, to give effect to the Thirteenth, the Fourteenth Amendment must be interpreted and applied to accommodate -- and not obstruct -- the purposes of the Thirteenth Amendment.[10]

other words of the Constitution. *See, e.g.*, Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses*?, 2000 Sup. Ct. Rev. 325, 329 (2001) ("the Equal Protection Clause itself may demand [race-conscious state action] in part because the Thirteenth and Fifteenth Amendments are like the Free Exercise Clause--counterweights to the presumption against state use of race or religion.").

[10] The Thirteenth and Fourteenth Amendments, of course, were intended to overcome the paradox between the "self-evident" truth of the Declaration of Independence and the "three fifths" clause of Article I, Section 2 of the Constitution.

C. The Elimination Of Disparities Associated With "Badges and Incidents of Slavery" Is a Compelling Interest Under The Thirteenth Amendment.

1. The remedial purposes and authority of the Thirteenth Amendment and the 1866 Civil Rights Acts.

The Civil Rights Act of 1866 is expressly race-conscious. It was enacted under the authority, and gave expression to the purpose and aims, of the Thirteenth Amendment. *See, e.g.*, ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION 1863-1877 244 (1988) ("In consitutional terms, the Civil Rights bill represented the first attempt to give meaning to the Thirteenth Amendment, to define in legislative terms the essence of freedom."). In fact, it was enacted over the veto of President Johnson. *Id.* at 251. Its clear language demonstrates its focus on race. The Act establishes, as the benchmark of equality, the classification of rights enjoyed by "white citizens."[11] Thus, the statute explicitly contemplates race-conscious comparisons and remedies aimed at bringing former slaves to the advantaged position enjoyed by "white citizens," not only in law, but in fact.

In holding the Civil Rights Act of 1866 constitutional under the Thirteenth Amendment, the Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968), noted that "the revolutionary implications of so literal a reading of

[11] The applicable provision of the Act states: "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . *as is enjoyed by white citizens* . . ." 42 U.S.C. § 1981(a) (1994) (emphasis added); *see also* 42 U.S.C. § 1982 (1994) (providing that all citizens have the same right "as is enjoyed by white citizens" to purchase and sell property).

§ 1982," as to reach private conduct, were exactly what Congress had intended. *Id.* at 422. In exploring the congressional debates, the Court found that "[i]n the House, as in the Senate, much was said about eliminating the infamous Black Codes. But, like the Senate, the House was moved by a larger objective -- that of giving real content to the freedom guaranteed by the Thirteenth Amendment." *Id.* at 433.

In *Jones*, this Court held that § 1982 bars all racial discrimination, private or public, in the sale or rental of property, as a measure to enforce the Thirteenth Amendment. *Id.* at 413. In reaching this holding, the Court looked to the "crucial language" of § 1981, guaranteeing to all citizens: "the same right, in every State and Territory in the United States, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property . . . *as is enjoyed by white citizens* . . . ." *Id.* at 423 (emphasis added). After expressly considering and rejecting the question whether a subsequent act narrowed the original intent of the Civil Rights Act of 1866, *see id.* at 416 n.20, the Court examined the statute's language, concluding that it "meant exactly what it said." *Id.* at 421-22. Thus, the Court expressly rejected any prior restrictive reading of the Act. *See id.* at 441 n.78. As Justice Powell would later suggest, the Court did not merely drift, almost accidentally, into this broad interpretation, but rather arrived at its conclusion deliberately. *Runyon v. McCrary*, 427 U.S. 160, 186 n.* (1976) (Powell, J., concurring).[12]

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[12] As Senator Trumbull explained: "This measure is intended to give effect to [the Thirteenth Amendment] and secure ... practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits." *Jones*, 392 U.S. at 431-32.

Moreover, the Court also held, that the subsequent adoption of the Fourteenth Amendment did not limit its scope:

> [I]t certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent readoption of the Civil Rights Act were [sic] meant somehow to *limit* its application to state action. The legislative history furnishes not the slightest factual basis for any such speculation, and the conditions prevailing in 1870 make it highly implausible.

Jones, 392 U.S. at 436.

Contemporaneous with this Civil Rights Act, the Reconstruction Congress enacted several race-conscious initiatives, for example, the Freedmen's Bureau Acts of 1865 and 1866. These acts permitted the Bureau to focus its efforts almost exclusively on *freedmen*. *See generally* Eric Schnapper, *supra* note 7, at 760-75; *see also id.* at 754 ("From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks."); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-31 (1997) (describing various statutes passed in the same era that were aimed at benefiting solely African Americans).[13] Among these efforts, education was recognized as fundamental. As observed by the first commissioner of the Freedmen's Bureau, General Oliver O. Howard: "Education is absolutely essential to the freedmen to fit them for their new duties and

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[13] Congress adopted such race-conscious measures over the same objections that opponents raise today--that such measures provided "special treatment" for African Americans. *See Bakke*, 438 U.S. at 397-98; Schnapper, *supra* note 7, at 773-74.

responsibilities . . . . Yet I believe the majority of the white people to be utterly opposed to educating the negroes." Schnapper, *supra* note 7, at 761 n.47 (citing H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. 33 (1865)).

2. The Thirteenth Amendment applies with full force to support Michigan's admissions program.

In defining its substantive scope, this Court long ago held that the Thirteenth Amendment permits Congress to "enact all necessary and proper laws for the obliteration and prevention of slavery, with all its badges and incidents." *Civil Rights Cases*, 109 U.S. 3, 21 (1883). The Court listed some of these badges and incidents, noting that "[c]ompulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and *such like burdens and incapacities* were the inseparable incidents of the institution." *Id.* at 22. More recently, in *Jones*, the Court made clear that this list was neither static nor exclusive, and that Congress may identify remaining relics of slavery and enact appropriate laws to remove them: "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." 392 U.S. at 440.

Citing *Jones*, the Court has since upheld the use of 42 U.S.C. § 1981, which provides a civil remedy for racial discrimination in the making and enforcement of private contacts, in cases involving private discrimination in providing education. *See Runyon v. McCrary*, 427 U.S. 160, 169 (1976). In *Runyon*, this Court expressly held that 42 U.S.C. § 1981 properly prohibits racial discrimination in public and private schooling, *id.* at 172, in furtherance of the interests of the Thirteenth Amendment, even over claims that

the prohibition infringed on other constitutionally protected rights. *Id.* at 175-79. Such rulings make clear that certain forms of discrimination can constitute badges and incidents of slavery.

The same day the Court decided *Runyon*, it also decided *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), in which the Court construed § 1981 to provide a cause of action to whites for claims of racial discrimination. After reviewing the legislative history, Justice Marshall, writing for the Court, concluded that Section 1981 should be read to include a "broader principle," i.e., to protect *all* races from racial discrimination. *Id.* at 295-96. Of course, the existence of such a broader principle does not obscure or remove the affirmatively remedial purpose and capacity of the Act, as the Court expressly noted that "the immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves." *Id.* at 289.[14]

While *Jones* dealt with Congress' authority to eradicate the badges and incidents of slavery on a national scope, the opinion anticipates approval of state actions furthering that goal.[15] Indeed, it is not subject to serious

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[14] Thus, Petitioners are mistaken in arguing that *McDonald* forecloses the remedial consideration of race. *See* Petitioners' Brief at 49. First, the Court in *McDonald* expressly does not consider the statute's effect on affirmative action programs. *McDonald*, 427 U.S. at 289 n.8. Second, the "broader principle" for which *McDonald* has been cited, has since given way to strict scrutiny approval of narrowly tailored, raced-based remedies. *See Bakke*, 438 U.S. at 405 (Blackmun, J., concurring). As Justice Stevens noted, "Neither the 'same standards' language used in *McDonald*, nor the 'color blind' rhetoric used by the Senators and Congressmen who enacted [Title VII], is now controlling." *Johnson*, 480 U.S. at 644 (Stevens, J., concurring).

[15] *Compare Jones*, 392 U.S. at 430 n.48 (quoting Senator Trumbull as stating that it was "for Congress to determine, and nobody

(Footnote continued)

debate that states can advance these compelling interests by acting to eradicate or remedy the badges of inferiority. *See, e.g.*, *Croson*, 488 U.S. at 518 (Kennedy, J., concurring); *see also Wygant*, 476 U.S. at 286 (O'Connor, J., concurring); *Adarand*, 515 U.S. at 237.[16]

In light of its express language, its revolutionary purpose, its broad remedial interpretation, and contemporaneous race-conscious legislative measures, the Civil Rights Acts of 1866 supports reasonably tailored affirmative action programs designed to remedy race-based educational deprivation of African Americans that can be historically linked to badges of servitude and inferiority.

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else," what legislation was appropriate) with *Jones*, *id.* at 432 n.54 (stating that "Senator Trumbull later observed that his bill would add nothing to federal authority if the States would fully 'perform their constitutional obligations.'"). *See also id.* at 422 n.29 (reading the legislative history to clarify that the 1866 statute had supremacy "over *inconsistent* state or local laws").

[16] Likewise in *Roberts v. United States Jaycees*, the Court upheld against a First Amendment challenge a state's "compelling interest in eradicating discrimination against its female citizens . . . ." 468 U.S. 609, 623 (1984). *See also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (holding state civil rights act advanced compelling interest in eliminating discrimination against women). The state statute in *Roberts*, the Court recognized, was an example of laws adopted by states "beginning a decade before enactment of their federal counterpart, the Civil Rights Act of 1875." 468 U.S. at 624. The Court recognized that while the federal statute had been struck down in the *Civil Rights Cases*, the Court there had emphasized the states' ability to enact such laws. *Id.* Furthermore, "[a] state enjoys broad authority to create rights of public access on behalf of its citizens." *Id.* at 625 (citation omitted). *See also Balsbaugh v. Rowland*, 290 A.2d 85, 92 n.9 (Pa. 1972) (citing both the Thirteenth and Fourteenth Amendments in upholding a school board plan correcting racial imbalances in the district, even where there was no history of *de jure* segregation).

3. Ameliorating badges and incidents of slavery is a distinct compelling interest under the Thirteenth Amendment.

A reading of the Thirteenth Amendment and the Civil Rights Act of 1866 to establish a compelling interest for race-conscious action is consistent with Justice Powell's concurrence in *Fullilove v. Klutznick*, 448 U.S. 448, 509-10 (1980), where he expressly addressed the first two Civil War Amendments in the context of strict scrutiny. There, he approved race-conscious contracting goals under "the analysis set forth [in his] opinion in" *Bakke*, finding that the congressionally-chosen remedy "serve[d] the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress." *Id.* at 496. He observed "that a Court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received." *Id.* at 506. Thus, Justice Powell concluded that the program challenged in *Fullilove* was "designed to serve the compelling governmental interest in redressing racial discrimination" and that "this Court has not required remedial plans to be limited to the least restrictive means of implementation." *Id.* at 508. Relying on both the Thirteenth and Fourteenth Amendments (*in pari materia*), he found:

> [T]he Enforcement Clauses of the Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination. But that authority must be exercised in a manner that does not erode the guarantees of *these Amendments*.

Id. at 510 (emphasis added).

Similarly, following this Court's lead in *Jones*, Judge John Minor Wisdom, writing for five other judges, also concluded that the Thirteenth Amendment's compelling interest in eradicating the badges and incidents of slavery justified "affirmative race-conscious relief." *Williams v. City of New Orleans*, 729 F.2d 1554, 1580 (5th Cir. 1984) (Wisdom, J., concurring in part and dissenting in part). After a thorough discussion of the history of the Thirteenth Amendment, Judge Wisdom stated that "[t]he first Justice Harlan, in his famous dissent [in *The Civil Rights Cases*], rejected the restrictive interpretation adopted by the majority. He reasoned that badges of slavery encompassed all practices that continued to label blacks as inferior because of their race." *Id.* at 1578. Judge Wisdom then noted that "[u]nder the *Jones v. Mayer* rationale, current forms of racial discrimination are badges of slavery that may be proscribed under the thirteenth amendment *if they are historically linked with slavery or involuntary servitude*." *Id.* at 1579 (emphasis added).

Judge Wisdom, thereby, effectively defined the compelling interest prong of the strict scrutiny review in Thirteenth Amendment terms, so long as a link could be made historically with Thirteenth Amendment badges and incidents of slavery.[17] Where the State acts to remedy what are fairly identified as the invidious consequences of Thirteenth Amendment badges and incidents, such a purpose properly is recognized as compelling. *See Fullilove*, 448 U.S. at 508; *Runyon*, 427 U.S. at 169.

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[17] This Court's cases interpreting the Thirteenth Amendment and the 1866 Civil Rights Act provide such limiting principles. *See Palmer v. Thompson*, 403 U.S. 217 (1971); *City of Memphis v. Greene*, 451 U.S. 100 (1981).

Voluntary race-conscious admission programs designed to increase diversity in higher education and with the effect of ameliorating the continuing deprivations of the legacy of slavery clearly comport with the history and purposes embedded in the Thirteenth Amendment and its legislative progeny. Furthermore, such programs are in harmony with the constitutional history of this Court since *Brown*. *See Bakke*, 438 U.S. at 407-08 (Blackmun, J.). Given the particular moorings of the Thirteenth Amendment and the Civil Rights Act of 1866, the Fourteenth Amendment must accommodate such voluntary affirmative programs. Where qualified minority students have historically and manifestly been kept out of the classroom, a race-conscious response is constitutionally permissible.

4. Race-based educational deprivations suggesting intellectual inferiority are "badges and incidents" of slavery the University permissibly addresses.

Educational deprivation and forced intellectual suppression were, and continue to be, a direct and significant badge and incident of American slavery. For example, under the 1755 slave code in Georgia, the penalty for teaching a slave to read or write was fifteen pounds sterling. A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS--THE COLONIAL PERIOD 258 (1978). Many slave-holding states' laws against education covered not only enslaved African Americans, but free "persons of colour" as well. For example, an Alabama law required that "[a]ny person who shall attempt to teach any free person of colour or slave to spell, read or write, shall upon conviction, . . . be fined in a sum not less than $250 nor more than $500," GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 142 (2d ed. 1856). As one Reconstruction scholar has observed, to many whites,

educating African Americans "symbolized the breakdown of a social system that had formed the cornerstone of the southern 'way of life.'" JACQUELINE JONES, SOLDIERS OF LIGHT AND LOVE: NORTHERN TEACHERS AND GEORGIA BLACKS, 1865-1873 50 (1980).

Nor were prohibitions on the education of African Americans confined to the South. This Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), cites to examples of state laws that reinforced "the same opinions and principles" of African American inferiority, including state criminal prosecutions for teaching African American children to read and write. *Id.* at 413-15 (citing *Crandall v. Connecticut*, 10 Conn. 339 (1834) (upholding the criminal conviction of Prudence Crandall under a Connecticut law that prohibited teaching nonresident African American children)).

Congressional supporters of the Thirteenth Amendment -- the overwhelming majority of whom also passed the Fourteenth Amendment – were fully cognizant of these laws and viewed the educational deprivation of African Americans as a badge or incident of slavery. As Congressman Morris of New York observed, "[a]n entire race has been deprived of all social rank, barred our schools, shut out from the gospel, and then held to be inferior for not rising in spite of their henderances [sic]." Cong. Globe, 38th Cong., 1st Sess. 2615 (1864). Similarly, Senator Wilson of Massachusetts stated, in arguing for passage of the Amendment:

> Then, sir, when this amendment to the Constitution shall be consummated the shackle will fall from the limbs of the hapless bondman, and the lash drop from the weary hand of the taskmaster. . and the school-house will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance.

Cong. Globe, 38th Cong., 1st Sess. 1324 (1864).

The Amendment's supporters understood that slavery was institutionally supported, deeply rooted, and systemic -- that it was enforced by a system of laws that denied African Americans the privileges and immunities of citizenship that "belonged to every free citizen, high or low, rich or poor." Cong. Globe, 38th Cong., 1st Sess. 1319 (statement of Sen. Wilson). Iowa Senator James Harlan defined "some of the necessary incidents of slavery which it was the specific object of the amendment to abolish," as including "the perpetuity of the ignorance of its victims." *Id.* at 1439. Concurring in *Jones*, Justice Douglas described the pernicious effects of slavery on white persons, as well as its continuing effects:

> The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock—to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.
>
> *Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men.*

392 U.S. at 445 (emphasis added). In words that continue to resonate today, Justice Douglas lamented that "the black[s] [are] protected by a host of civil rights laws. But the forces of discrimination are still strong." *Id.* at 447.

Brown and its continuing progeny make clear that the Civil War Amendments have not yet achieved their goal, and

the subjugation of African Americans through educational deprivation is not an unpleasant relic of the 1800's, but rather an unremitting and contemporary badge and incident of that past.[18] In words that ring as true today as they did in 1978, one Michigan federal district judge wrote, "we observe a generation of children being injured by an admittedly segregated school situation, another generation receiving inferior educations and being deprived of the technical and intellectual skills that will enable them upon graduation to perform in significant positions competently and confidently." *Berry v. School Dist. of Benton Harbor*, 467 F. Supp. 721, 732-33 (W.D. Mich. 1978). An all too evident truth about this nation's educational systems is that the Civil War Amendments' promise of equal educational opportunity has yet to be realized for most students of color.[19] This includes African American students in Michigan who, by the

[18] *See, e.g., Bradley v. Milliken*, 433 F.2d 897 (6th Cir. 1970); *Berry v. School Dist. of Benton Harbor*, 505 F.2d 238 (6th Cir. 1974); *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974); *NAACP v. Lansing Bd. of Educ.*, 559 F.2d 1042 (6th Cir. 1977); *United States v. School Dist. of Ferndale*, 616 F.2d 895 (6th Cir. 1980).

[19] For example, half the University's students derive from Detroit metropolitan schools, yet 92% of city students are African American, where schools have been so poorly funded classes must share books, and in the late 1980s "[o]f an entering ninth grade class of 20,000 ..., only 7,000 graduate from high school, and, of these, only 500 ha[d] preparation to go to college." JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICAN SCHOOLS 198 (1992). Such disparities are traceable to race-based considerations in school funding. For example, as the former Speaker of the Michigan House of Representatives, made clear, "[p]eople in affluent [predominantly white,] Farmington ... 'are not going to vote for more taxes so the poor black kids in Ypsilanti can get ... better reading programs.'" *Id.* at 199.

time they enter eighth grade, are nearly four years behind their white peers in math and science.[20]

The simple and ineluctable fact is that an objective review of factors considered by the University in making its admission decisions reveals stark racial disparities.[21] Ultimately, public universities ought not to be barred from voluntarily adjusting their admissions policies to account for these contemporary badges and incidents of slavery. *See Wygant*, 476 U.S. at 290-91 (O'Connor, J., concurring) (citing *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165-66 (1977), and *McDaniel v. Barresi*, 402 U.S. 39 (1971)); *see also Bush v. Vera*, 517 U.S. 952, 977 (1996); *id.* at 990, 992, 994 (O'Connor, J.,

[20] The Education Trust, *Ed Watch Online: State Summary of Michigan* (2001), *available at* http://www.edtrust.org.

[21] Present racial disparities exist in each of the factors the University considers in admissions: standardized exams, Expert Report of Claude Steele in *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) (citing THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips, eds., Brookings Institute Press 1998) (racial gap in SAT scores), David R. Harris & Justin L. Thomas, THE EDUCATIONAL COST OF BEING MULTIRACIAL: EVIDENCE FROM A NATIONAL SURVEY OF ADOLESCENTS (Univ. of Mich. Population Studies Center, 2002), available at http://www.psc.isr.umich.edu/pubs/papers/rr02-521.pdf (racial differences in GPA and difficulty of curriculum) (African Americans are 18.8% of public school enrollment in Michigan, but only 4.5%, 3.7%, and 2.6% of students taking the State's Advanced Placement English Composition, Calculus, and Biology exams); JEFFERY R. HENIG, et al., THE COLOR OF SCHOOL REFORM: RACE, POLITICS, AND THE CHALLENGE OF URBAN EDUCATION 43 (Princeton University Press, 1999) (high school quality) ("the schools [black] children attended [in Detroit] were often in terrible physical condition, and their supplies and equipment fell far below standard."); Joint Summary of Undisputed Facts (App.106a-118a) at 3482 (geography) (the forty-five northern counties that receive preferences are overwhelmingly white); Interveners' Petition for Writ of Certiorari at 10 (alumni relationships) (African Americans in Michigan are "less likely to have alumni parents or relatives").

concurring); *id.* at 1033-35, 1014 n.9 (Stevens, J., dissenting).

D. <u>The Thirteenth Amendment And The 1866 Civil Rights Act Both Inform the University's Compelling Interest in Identifying And Admitting A Racially Diverse Student Body.</u>

The Respondents and *amici* associated with higher education will fully apprise the Court of the academic interests, benefits, and meaning of diversity in higher education. We write here only to suggest that the Thirteenth Amendment and its implementing legislation inform the compelling interest in obtaining a diverse student body. Stated simply, given not only the complex and torturous history of race in this nation, but the contemporary social, political, cultural, and economic realities it has shaped, race is not simply a matter of skin color or features. Race is not simply a characteristic irrelevant to an individual. It is one of a number of dimensions of an individual, and many of the events and factors that shape it, like the institution of slavery itself, are based on group interaction. Recognition that race has an influence on the individual, does not suggest an assumption that individuals of a particular race will be affected in the same way, or will espouse the same views. Such stereotypical treatment gives rise to impermissible classifications.

It is also true, however, that there are circumstances in which a person's race, like one's gender, and consequent life experiences can affect his or her perspective. In *J. E. B. v. Alabama*, the Court struck down the use of peremptory challenges to female jurors in a paternity and child support case, holding it a violation of the Equal Protection Clause because the use of gender served to ratify and perpetuate invidious stereotypes about the relative abilities of men and women. 511 U.S. 127, 140 (1994). But in her concurrence, Justice O'Connor noted that, in some instances, "We know

that, like race, gender matters" – pointing to studies showing that in rape cases, female jurors are somewhat more likely to vote to convict than male jurors, and positing that in sexual harassment, child custody, or spousal or child abuse cases, "a person's gender and resulting life experiences will be relevant to his or her view of the case." *Id.* at 148-49. Just as gender and resulting life experiences may affect a juror's perspective in some cases, educators understand that race and gender can affect a student's perspective and contributions in the classroom, and race and gender diversity can affect the educational experience for all students.

<u>CONCLUSION</u>

For the foregoing reasons, *Amici Curiae* respectfully submit that the judgment of the United States District Court for the Eastern District of Michigan, Southern Division, should be affirmed, as that judgment relates to the University's admissions program for 1999 and 2000.

Respectfully submitted,

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